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In The

Supreme Court of the United States

KEVIN M. McGUINNESS,
Petitioner,

vs.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- Whether, where a claim of disability non-accommodation is determined ultimately to be without merit, the doctrine of res judicata should bar separate litigation by an individual alleging denial of due process in the investigation of his discrimination claims.
- Whether, for purposes of application of the doctrine of res judicata, a University discrimination complaint investigation unit is in privity with the University division alleged to have committed discriminatory acts, and which the discrimination complaint investigation unit is required to investigate.
- Whether the Tenth Circuit Court of Appeals erred when it failed to conclude that the University of New Mexico, an agency of the State, may not assert privity on procedural due process issues where that State's actors are alleged to have used their privity to deprive Dr. McGuinness of his constitutional rights?
- Whether the Tenth Circuit Court of Appeals erred when it failed to consider Dr. McGuinness' allegations that he was deprived by the State of New Mexico of his right to use the University of New Mexico's established adjudicatory procedure to resolve his procedural due process claims, where the University's procedures were the only effective remedy under the specific circumstances?

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The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in Appendix A beginning at p. I. The decision of the United States District Court for the District of New Mexico is set forth in Appendix B beginning at p. VII.

STATEMENT OF JURISDICTION

On July 28, 1998, the United States District Court for the District of New Mexico granted summary judgment in favor of Respondent. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. On May 24, 1999, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's granting of summary judgment. This court has jurisdiction to review the case under 28 U.S.C. §1254.

STATUTES INVOLVED

42 U.S.C §12212 (Alternative Means of Dispute Resolution) provides:

Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act.

42 U.S.C §12112 ("Discrimination") provides:

- (a) General rule No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

- (b) Construction As used in subsection (a) of this section, the term "discriminate" includes –

  - (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

  - (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an

employee of the covered entity, or an organization providing training and apprenticeship programs);

- (3) utilizing standards, criteria, or methods of administration

- (A) that have the effect of discrimination on the basis of disability; or

- (B) that perpetuate the discrimination of others who are subject to common administrative control;

- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

- (5)
  - (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. §12132 of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. "

STATEMENT OF THE CASE

This is an appeal from the dismissal of Plaintiff's claims by the trial court. The Memorandum Opinion and Order was filed on July 28, 1998. Appellant's Notice of Appeal was thereafter timely filed on August 26, 1998.

Appellant filed suit on April 2, 1997, alleging violation of the Americans With Disabilities Act and the Rehabilitation Act of 1973 by the University of New Mexico (UNM) Equal Opportunity Program (EOP) in connection with multiple procedural improprieties on the part of the UNM EOP Office;

Defendants filed their "Motion for Immediate Dismissal" on the grounds of Res Judicata on August 5, 1997. This Motion, duly responded to by Dr. McGuinness, was based on the doctrine of res judicata arising from the trial court's prior adjudication in McGuinness vs.

University of New Mexico School of Medicine, USDCNM No. 95-1434 MV/LFG.

On 28 July 1998, the trial court entered its Memorandum Opinion and Order (Attached as Appendix B) dismissing Dr. McGuinness' case on the grounds of res judicata. This appeal followed.

Dr. McGuinness timely appealed the decision of the District Court. The 10th Circuit Court of Appeals affirmed on May 24, 1999. (Tenth Circuit Opinion attached as Appendix A) This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TRIAL COURT ERRED IN ITS ANALYSIS THAT THE INSTANT CASE FORMS PART OF THE SAME TRANSACTION AS DR. McGUINNESS' EARLIER LITIGATION

Dr. McGuinness initiated the instant lawsuit to vindicate his rights to have a proper investigation conducted on his complaint, and to be free from retaliation for bringing that complaint, as established pursuant to the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.* (as amended); and the Rehabilitation Act of 1973, 29 U.S.C. §794 (as amended). The complaint in the case now before the court arises from acts and omissions that are separated in time and nature from the acts and omissions complained of in the other litigation relied upon by the Defendants. The parties alleged to have violated the Plaintiff's rights are not the same as the University of New Mexico School of Medicine, the sole party named in the litigation brought in the prior case.

The nature of the interest sought to be protected is entirely different in this case from the interest in Dr. McGuinness' first litigation. In McGuinness I, the Plaintiff sought to show that the University of New Mexico School of Medicine failed to accommodate his disability. In McGuinness II, the Plaintiff seeks to demonstrate

that the University of New Mexico Equal Opportunity Programs Office retaliated against him by depriving him of due process and a meaningful right to be heard. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S.Ct. 1148, 1150-1155, ____ L.Ed.2d ____ (1981) (the right to use administrative adjudicatory procedures is a species of property protected by the Due Process Clause); Parratt v. Taylor, 451 U.S. 527, 541 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981) (To show a failure of due process, a plaintiff might show that state procedures as written do not supply basic due process or that state officials acted in a "random and unauthorized" fashion in depriving the plaintiff of his protected interest.) The United States Department of Education, in ruling that Dr. McGuinness had been discriminated against when the UNM EOP Office refused, initially, to investigate Appellant's claims at all, recognized the separate right to a meaningful opportunity to participate in the administrative hearing process as separate and apart from the possible merits of the claim to be asserted in that process. (See Appendix C)

The right to a meaningful hearing and to participate in administrative alternative dispute resolution mechanisms is echoed in the structure of the Americans With Disabilities Act, itself. (See, 42 U.S.C §12212 (Alternative Means of Dispute Resolution)) Interference with the right to file a charge, testify, assist, or participate in any

manner in an investigation, hearing, or proceeding under the Americans With Disabilities Act is prohibited. (See EEOC Enforcement Guidance: Nonwaivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes, Issued May 2, 1997)

These issues were not decided in the prior litigation, nor should they have been brought before the trial court in that case. Because of the separation of actors and events, because of the separation of causal elements giving rise to the two litigations, and because of the entirely different interests sought to be protected, the facts underlying the two cases do NOT form a "convenient trial unit" as required by the doctrine of res judicata. The claims in this lawsuit are NOT "the same or nearly the same" as those brought before the Court in the other litigation. A judicial finding that Plaintiff's condition is not a "disability" within the meaning of the ADA and the Rehabilitation Act is without effect as regards Plaintiff's right to have his complaint investigated and to be free from retaliation as a result of bringing that complaint. Newly discovered evidence of continuing retaliation means that the "full and fair opportunity" to litigate requirement for application of case and issue preclusion has not been met. Defendants' motion, brought pursuant to the doctrine of res judicata, was therefore without merit and should have been denied.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE "IDENTITY OF THE PARTIES" PRONG OF THE RES JUDICATA INQUIRY FAILS, AND DR. McGUINNESS SHOULD HAVE BEEN ALLOWED TO SEPARATELY LITIGATE HIS SEPARATE CLAIMS

There is no identity of the parties between this case and the case previously decided by District Judge Vázquez. Different University of New Mexico entities are named in the two litigations. The original case before the trial court named only the University of New Mexico School of Medicine. The case presently before the court does not name the University of New Mexico School of Medicine, or any official of the University of New Mexico School of Medicine, as defendant. This case is entirely against the Office of Equal Opportunities Programs and associated officials. These officials are not members of the faculty of the UNM School of Medicine, nor are they "alter egos" of such individuals. By the very nature of the function fulfilled by the Office of Equal Opportunities Programs, that of investigating complaints of discrimination, it must enjoy significant autonomy and independence from any other entity within the university setting. There can be no substantial overlap between the interests of the university EOP office and the medical school when the functions and obligations of the two entities are so highly distinct and separated. The "identity of the parties" prong of the requirement for res judicata therefore

fails. *See, e.g.*, Satsky v. Paramount Communications. *Compare* Lowell Staats Mining Company, Inc. v. Philadelphia Electric Company, 878 F.2d 1271, 1274-1275 (10th Cir.1989) (Privity, for purposes of doctrine of res judicata and collateral estoppel, requires, at a minimum, substantial identity between issues in controversy and showing that parties in two actions are really and substantially in same interest.)

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE "PRIVITY" ALTERNATE REQUIREMENT FOR APPLICATION OF THE DOCTRINE OF RES JUDICATA ALSO FAILS

Privity, for purposes of the doctrine of res judicata and collateral estoppel, requires, at a minimum, a showing of substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in the same interest. Lowell Staats Mining Company, Inc. v. Philadelphia Electric Company. The district court's Memorandum Opinion and Order states that the Appellant "remain[s] tacit on the issue of privity." Memorandum Opinion and Order at 4, Appendix B, p. XI. This is completely contrary to the facts. Plaintiff stated in his Memorandum Brief in Support of Response to Defendants "Motion for Immediate Dismissal" that "there can be no substantial overlap between between the interests of the university EOP office and the medical school when the functions and obligations of the two entities are so highly distinct

and separated." Indeed, the role of the university EOP office is adjudicatory as regards complaint resolution. In fact, Defendants' arguments and the district court's conclusions that Plaintiff had 1) "all relevant facts at his command when he filed his November, 1995 complaint" (Memorandum Opinion and Order entered July 28, 1998, Appendix B, p. XIV) and 2) "a full and fair opportunity to litigate his claims in a prior suit, depend completely upon an assumption that the UNM EOP dispute resolution process was fair, impartial and free from the administrative control of the UNM Board of Regents or any other division of the university that might rely upon it. (Id. at p. XV)

If the district court's conclusion is not error and the Defendant in this case (UNM Office of Equal Opportunity Programs) is in privity with and the Defendant Board of Regents, the conclusion is inescapable that the Board of Regents has influence over the dispute resolution process and an interest in the outcome of this adversarial proceeding. Therefore, there can be no summary judgment that "all relevant facts" were discovered to support a "full and fair opportunity to litigate." If there was a full and fair opportunity to litigate, there is no privity. If there is privity, the information necessary to litigate is under the control of the Defendant and the Appellant is prevented from acquiring "all the relevant facts" necessary to a "full and fair opportunity to litigate." This "Catch 22" must support Dr. McGuinness in

the case at bar. The Appellant has from the outset concluded that there was no privity and assumed that the proceedings were unbiased and free from the unfair influence of the Defendant. The witnesses and the evidence dispute that conclusion. If the UNM EOP, the UNM School of Medicine and the UNM Board of Regents are in privity, it is in the sense that co-conspirators are in privity. This result cannot be countenanced by the law, and hence this alternate element for application of the docrtine of res judicata fails.

THE "IDENTITY OF THE ISSUES" REQUIREMENT FOR APPLICATION OF THE DOCTRINE OF RES JUDICATA FAILS

There is no identity of the issues between this case and the decision relied upon by the defense in advancing its arguments. The original decision by the trial court nowhere references the actions or omissions of the Office of Equal Opportunity Programs and its officials upon which the instant litigation is based. *See* Memorandum Opinion and Order Entered July 3, 1997, USDCNM No. 95-1434 MV/LFG, Appendix D. beginning at p. XXXI. Similarly, that opinion nowhere references claims of due process violation through failure to properly investigate a complaint, or retaliation for bringing a complaint, as are alleged in this case. Id. Finally, an ultimate determination that Plaintiff's condition does not fall within the ADA's definition of "disability" in no way diminishes the obligations of the defendants herein to conduct fair and impartial

inquiry into the Plaintiff's complaint and to refrain from retaliating against him for bringing that complaint. There is complete failure here on the part of the defendants to establish identity of the issues. More than separate legal theories of liability are involved here. There is near total separation as to specific dates, acts and omissions, evidence and proofs. *See* Clark v. Haas. Nothing in the case at bar was "necessarily decided" in connection with Judge Vázquez's decision or "necessary to support" that decision. *See* Robinson v. Volkswagenwerk AG, 56 F.3d at 1273, *citing* Restatement (Second) of Judgments, §27.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TWO CASES DO NOT FORM A "CONVENIENT TRIAL UNIT"

A third requirement for application of the doctrine of res judicata is that the second case form a "convenient trial unit" with the first, so that the two should have been litigated together. *See* Clark v. Haas Group, Inc., 953 F.2d at 1237,*citing* Restatement, Second, of Judgments, §24, comment b. Far from forming such a "convenient trial unit" with the first case, the case now before the Court involves issues so substantially distinct, and evidence and proof that have no bearing on the issues before the trial court in the first case, so that this requirement also fails.

The trial court's prior decision is limited to the duties of the University of New Mexico School of Medicine to provide reasonable accommodations to the Plaintiff for his own disability, and to refrain from discriminating against the Plaintiff by virtue of his son's disability. The instant case is based upon the duty to investigate Plaintiff's complaint and the duty to refrain from retaliatory actions against the Plaintiff as a result of his bringing that complaint. These duties and obligations are entirely distinct and separate from the matters litigated in the first case.

More than separate legal theories are involved here. The acts and omissions of the University of New Mexico Office of Equal Opportunities Programs involved in the instant case are separate in time, space and origin and motivational relationship from the acts and omissions of the UNM School of Medicine brought before the Court in the first case. The duties and obligations of the UNM Office of EOP are independent from the duties and obligations of the UNM School of Medicine, and are separate and distinct from any outcome in that case. The witnesses and proofs relevant to this case are also highly distinct, and if combined with the previous case, would form a cumbersome, unwieldy trial unit, creating difficulties for both the Court and the litigants. *See* King v. Union Oil, 117 F.3d at 445, *citing* Lowell Staats Mining Co., Inc. v. Philadelphia Elec. Co., 878 F.2d 1271,

1274 (10th Cir. 1989, Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1239, 1335 (10th Cir. 1988, and Restatement (Second) of Judgments §24 (1982). This element of the requirements for res judicata therefore also fails.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE EXISTS HERE "A DEFICIENCY THAT WOULD UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE ORIGINAL PROCEEDINGS"

"The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." Richards v. Jefferson County, Alabama, 517 U.S. 793, 797, 116 S.Ct. 1761, 1765, 135 L.Ed.2d 76 (1996), *citing* Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48, 18 S.Ct. 18 [27], 42 L.Ed. 355 (1897).

In determining whether to apply the doctrine of res judicata, a Court must consider whether there exists "a deficiency that would undermine the fundamental fairness of the original proceedings." Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d at 1334. In making this determination, the significant inquiry is whether "there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.' " Id. at 481, 102 S.Ct. at 1897 (quoting Montana v. United States, 440 U.S. 147,

164 n. 11, 99 S.Ct. 970, 979 n. 11, 59 L.Ed.2d 210 (1979)). *See also*, Phelps v. Hamilton, 122 F.3d 1309, 1322 (10th Cir. 1997); Griego v. Padilla, 64 F.3d 580, 584 (10th Cir. 1995); Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City, 952 F.2d 1183, 1196 (10th Cir. 1991); Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986). *Cf.* Louis Cook Plumbing & Heating, Inc. v. Frank Briscoe Co., 445 F.2d 1177, 1179 (10th Cir.1971) (refusing to bar through claim preclusion an action for labor and materials supplied in the performance of a construction subcontract when the plaintiff "was actually denied the right to litigate any issue in the prior action except Miller Act questions."). Multiple deficiencies in the prior litigation herein prevented the Appellant from fully and fairly litigating the issues he seeks to litigate in this case, and therefore preclude the application of res judicata to bar adjudication of those issues. *See* Haring v. Prosise, 462 U.S. 306, 317, 103 S.Ct. 2368, 2375, 76 L.Ed.2d 595 (1983), in which the High Court ruled:

> [P]etitioners maintain that Prosise should be barred from litigating an issue that was never raised, argued, or decided, simply because he had an opportunity to raise the issue in a previous proceeding. .... According to petitioners, such a federal rule of preclusion .... is necessary to further important interests in judicial

> administration. ... There is no justification for creating such an anomalous rule.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant the petition on writ of certiorari.

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